Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

DAVID L. WILKINSON
Utah Attorney General
DALLIN W. JENSEN
Solicitor General
Counsel of Record
MICHAEL M. QUEALY
Assistant Attorney General
R. DOUGLAS CREDILLE
Assistant Attorney General
1636 West North Temple, Suite 300
SALT LAKE CITY, UT 84116
(801) 533-4446
ATTORNEYS FOR PETITIONER

August 20, 1986

TABLE OF CONTENTS

Page

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935) 4

California v. United States,
438 U.S. 645 (1978) 5, 6

Montana v. United States,
450 U.S. 544 (1981) 2, 3, 5, 6, 7

Pollard's Lessee v. Hagan, 3 How. 212 (1845) 4

United States v. California,
436 U.S. 32 (1978) 3, 4

Statute:

25 Stat. 505 (Sundry Appropriations Act of 1888) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

This case concerns the sovereign ownership of the bed of Utah Lake under the Equal Footing Doctrine. The decision below does more than wrongly deprive Utah of its sovereign and proprietary ownership and control of the lakebed. It also creates fundamental issues of State sovereignty and equality, and of the proper rela-

tionship between the state and federal systems; of whether an Equal Footing entitlement can be defeated by an administrative withdrawal (rather than by a duly authorized conveyance) of the submerged land; of whether the United States, as the States' trustee over sovereign lands pending statehood, has fulfilled its trust duties (and whether it even correctly understands those duties); of whether the inherent and long-recognized distinction between sovereign lands and public-domain lands survives; and of whether the court of appeals has applied the correct standard and analysis under the Equal Footing Doctrine.

This case is very important to Utah. Utah Lake is the State's largest freshwater lake and one of its important resources. But the aforementioned issues make this case also one of national significance, as is clear from the fact thirty other States have joined as *amici* to urge the Court to grant certiorari.

Their concern is justified. The decision below elevates federal reservations and withdrawals over the States' Equal Footing entitlements. That decision jeopardizes State sovereignty and equality, the States' dignity and standing relative to the Federal Government, and the status of sovereign lands. Because of the Constitutional problems it creates, and its conflict with a long line of this Court's decisions, including *Montana v. United States,* 450 U.S. 544 (1981), the decision below should be reviewed.

1. The United States' "Brief For The Respondents In Opposition" demonstrates some of the reasons the

Court should grant certiorari in this case. Respondents state that despite the Equal Footing Doctrine, "Congress has the *unquestioned* power to reserve or otherwise dispose of such submerged lands that have not been included within a state, and thereby to defeat the title to such lands that otherwise would pass to the state . . . ." Respondent's Brief 6 (emphasis added). Their statement is not true; whether the Government may reserve or withdraw sovereign lands to defeat a State's title is a vital issue this Court has never decided in this context. The Court has found Constitutional authority for the United States' deprivation of a State's Equal Footing entitlement only in cases where the United States had previously made a valid *conveyance* of the submerged lands to a third party. And such cases are very few indeed. See Pet. 19 and n. 14. As even the Respondents admit, *Montana v. United States* "stated that a pre-statehood *conveyance* would not be lightly inferred . . . ." Respondents' Brief 10 (emphasis added).

USGS's administrative withdrawal of the bed of Utah Lake is not tantamount to a conveyance from the United States to a new owner. It is merely a particular federal land classification. *United States v. California,* 436 U.S. 32, 40 (1978). Even assuming the soundness of Respondents' argument (Respondents' Brief 10, n. 6), which we dispute, that it really was Congress, not just USGS, that had intended to reserve or withdraw the bed of Utah Lake, nothing changes the unavoidable conclusion that no conveyance ever was made and that the United States still possessed title, which was then available to pass to Utah at statehood.

If something less than a conveyance will suffice to satisfy the Constitutional standard, this Court has never suggested as much. Indeed, in the only analogous decision of this Court, *United States v. California,* 436 U.S. 32 (1978), the State's title was upheld under the Submerged Lands Act despite federal reservation of the disputed land. The Court stated that the federal reservation could not improve the United States' claim to the land as against the State. *Id.* at 41. The decision below, which deprived Utah of title, is contrary to this Court's precedents and reflects a lack of understanding of the ramifications.

2. The Federal Government has long been obligated to act as trustee over the future States' Equal Footing lands. *Pollard's Lessee v. Hagan,* 3 How. (44 U.S.) 212 (1845); *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15 (1935). In light of that fiduciary responsibility, it is very disturbing that Respondents claim the "unquestioned" power to defeat a State's Equal Footing entitlement simply by withdrawing or reserving submerged lands. Such "power" is far from "unquestioned"; indeed, according to established Constitutional law, such power does not exist. The United States' readiness to "presume away" the State's entitlement raises doubt about its commitment to its trust responsibilities. The trustee's failure to appreciate the rules governing such an important trust constitutes a cogent reason to grant certiorari in this case.

3. While, if the legal requisites are met, trust property (sovereign lands) can be conveyed before statehood, it is permissible only under "some international duty or

public exigency." *Montana v. United States,* 450 U.S. 544, 552 (1981). However, the decision below would permit a federal reservation or withdrawal to defeat sovereign title for something less than a public exigency,[1] contrary to this Court's decisions. *Id.*

Utah emphasizes, moreover, that the problem with the decision below is not just its failure to understand the correct "public exigency" standard. Rather, it is also that there was no relevant public exigency in any event. "Exigency" denotes a very strong need, and the lakebed clearly was not at all needed for the 1888 Act's assumed purpose of facilitating irrigation. See Pet. 16.

Under Utah water law, the water of Utah Lake was always available for irrigation regardless of whether Utah or the United States owned the bed of this navigable lake. *Cf. California v. United States,* 438 U.S. 645, 660 (1978). Irrigation did not depend on the lakebed, so the purported public purpose or exigency could not have involved the lakebed. The unavoidable implication of Respondents' position, that withdrawal of the lakebed was exigently necessary to irrigation, is patently illogical. See Pet. 9-15.

Having shown that there was no public exigency upon which withdrawal of the lakebed could be justified, we add that the other requirement of *Montana v. United*

---

[1] The Tenth Circuit's standard, supported here by Respondents as somehow appeasing the true Constitutional standard, is that States may be deprived of sovereign lands whenever the federal action was intended to meet some "appropriate" public purpose or "a public purpose motivated by a public exigency." Pet. App. 23a; Respondents' Brief 5-6, 9, n. 5.

States, supra, also has not been met here: The "strong presumption" must be that there has been no federal pre-statehood conveyance of a State's sovereign land. *Id.* at 552; Pet. 8, 11-12. That presumption can be overcome only by a Congressional intent "definitely declared or otherwise made [very] plain," "in clear and especial words." *Montana,* at 552; Pet. 8. Under *Montana* both the "public exigency" and "definiteness of expression" components must be present. In this case neither is present.

Respondents irrelevantly state that: "[t]he opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts." Respondents' Brief 8, quoting *California v. United States,* 438 U.S. 645, 659 (1978). Such concerns could not have mattered in the instant case. The bed of Utah Lake was neither legally nor actually susceptible of being settled or homesteaded. Simply, there was no purpose, need or exigency for reserving the lakebed, and Congress did not express any intention to effect such a reservation. Respondents' attempt to defeat the State's title must therefore fail.

The decision below makes it much easier than this Court has ever allowed, for the United States to justify depriving a State of its Equal Footing entitlement. If the decision below is not corrected, more encroachments will likely follow, especially since this case indicates that Respondents will not exert proper fiduciary dedication towards their Constitutional trust obligations. Respondents' position reflects great insensitivity to the States' sovereign rights under the Equal Footing Doctrine.

4. Utah's Petition shows that several Constitutional Equal Footing problems flow from the decision below. Respondents have failed to respond to most of them. For example, Respondents simply ignore the impact this case will have, legally and practically, on the classification, administration, and ownership of sovereign lands vis-a-vis public-domain lands. Pet. 5, 17. They also make no mention of the lower court's inversion of the "strong presumption" this Court has firmly established in favor of States' sovereign title. *Montana v. United States,* 450 U.S. at 552; see Pet. 8-11, 17-18.

The sovereign rights protected under the Equal Footing Doctrine are vital to the States. Their deprivation as allowed by the lower court creates serious concerns that the Federal Government is arrogating powers not given it, to the disparagement of rights long held to have been reserved by the States as inherent rights. The States' entitlement should not be denied except upon the exacting standards consistently enforced by this Court. The decision below falls far short of those standards, and should be reviewed and reversed.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID L. WILKINSON
Utah Attorney General

DALLIN W. JENSEN
Solicitor General
Counsel of Record

MICHAEL M. QUEALY
Assistant Attorney General

R. DOUGLAS CREDILLE
Assistant Attorney General

1636 West North Temple, Suite 300
SALT LAKE CITY, UT 84116
(801) 533-4446
ATTORNEYS FOR PETITIONER

August 20, 1986